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Nos. 82-1585, 82-1586, and 82-1582

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ASSOCIATED MILK PRODUCERS, INC.,
*Petitioner,*

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
*Respondent.*

MID-AMERICA DAIRYMEN, INC.,
*Petitioner,*

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
*Respondent.*

CENTRAL MILK PRODUCERS COOPERATIVE,
*Petitioner,*

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## JOINT REPLY BRIEF OF THE PETITIONERS ASSOCIATED MILK PRODUCERS, INC., MID-AMERICA DAIRYMEN, INC. AND CENTRAL MILK PRODUCERS COOPERATIVE

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## JOINT REPLY BRIEF OF THE PETITIONERS ASSOCIATED MILK PRODUCERS, INC., MID-AMERICA DAIRYMEN, INC. AND CENTRAL MILK PRODUCERS COOPERATIVE

### I. Respondent's Arguments Reinforce The Conflict Among The Circuits Concerning Need To Prove Relevant Market

Respondent National Farmers' Organization ("NFO") is attempting to rationalize the Eighth Circuit's decision based upon a *per se* theory of illegality, which NFO never urged before the trial court, and which the Eighth Circuit flatly rejected.[1] Opposition Brief of NFO at 6-8 (hereinafter "Opposition Br."). At the same time, NFO would lead this Court to believe that the Eighth Circuit's *de novo* finding of a Sherman Act violation was really predicated on a *per se* analysis of § 1 of the Act and that the Eighth Circuit's § 2 analysis was merely an afterthought and, thus, superfluous. Opposition Br. at 11. On the contrary, the Eighth Circuit's analysis dealt entirely with a § 2 conspiracy to monopolize, after it concluded that NFO's inadequate relevant market proof could not sustain actual or attempted monopolization claims under § 2. 687 F.2d at 1192; A.29a. This § 2 finding was then automatically converted into a § 1 "rule of reason" violation. In short, NFO's contorted hypothesis turns the Eighth Circuit's decision on its head and clearly reflects a deep-seated recognition that the decision cannot be justified within the framework of any meaningful analysis of the competitive market.

The Eighth Circuit's expansive interpretation of § 2 is erroneous and stands out as bad antitrust policy. The decision holds

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[1] NFO's suggestion that the court of appeals' decision somehow was a *per se* holding, without "the talismanic phrase, *per se*", overlooks the fact that NFO strenuously, but unsuccessfully, urged the court to adopt this *per se* approach. 687 F.2d at 1193; A.30a. Furthermore, the court's failure to use the term *per se* preceding "unreasonable" could not have been inadvertent. The court was able to recognize a *per se* violation and specifically applied that label to the price-fixing conduct of NFO. 687 F.2d at 1184; A.12a.

that proof of "relevant market" is not required to establish either § 2 conspiracy to monopolize claims or § 1 "rule of reason" claims. Under that rationale, business torts, irrespective of economic or competitive effect, could be converted into violations of § 2 and § 1. Although there is absolutely no basis for NFO's strained contention that the court of appeals' decision amounted to a *per se* finding, this very interpretation suggests the potential for mischief and highlights the importance of review by this Court.[2]

Respondent ignores the clear language of § 2 and contends that there is no circuit conflict on the need to prove relevant market in § 2 conspiracy to monopolize cases. In an attempt to distinguish away the clear conflict, NFO argues that the cases relied upon by petitioners "involved ordinary rule of reason-type offenses that had ambiguous competitive significance unless analyzed in a structural setting." Opposition Br. at 8.[3] First, NFO forgets that this case too involves the "rule of reason." Second, the fallacy of its position is rather clearly

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[2] There could be no basis for adopting a *per se* approach to activities involved in this case because the courts have had insufficient experience to condemn the subject conduct as *per se*, especially where it takes place within the complex and highly regulated dairy industry. *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 7-11 (1979). We are aware of no reported case that has applied the *per se* rule to unilateral or joint conduct of agricultural cooperatives.

[3] NFO attempts to circumvent the importance of relevant market proof by repeatedly applying the "predatory" label to petitioners' conduct. Opposition Br. at 2-5, 6-8. Significantly, NFO ignores the definition of "predation" utilized by the court of appeals in assessing the nature of the conduct at issue. The Eighth Circuit included within the concept of "predation" conduct which is "merely 'anticompetitive' " irrespective of whether it is economically justified. 687 F.2d at 1183; A.10a. Thus the Eighth Circuit clearly misapplied the principle that an agricultural cooperative may lawfully intend to and "willfull[ly]" acquire or maintain monopoly power. *See Fairdale Farms, Inc.* v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1045 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981).

exemplified by *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981), one of the conflicting cases cited by petitioners. AMPI Petition at 14; Mid-Am Petition at 11. In that case, the Fifth Circuit required relevant market proof for a § 2 conspiracy claim and a § 1 "rule of reason" claim where the conduct at issue included commercial bribery, theft of trade secrets, and spurious lawsuits.

Respondent's reliance on the aberrational rule of the Ninth Circuit in *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 926-27 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), highlights the conflict among the circuits. The rationale of that case is fundamentally at odds with this Court's interpretation of § 2 attempt to monopolize cases and that of virtually every other circuit. AMPI Petition at 11 n.6. That decision can provide no solace to respondent unless it expects this Court to ignore its holdings in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) (relevant market essential in § 2 attempt to monopolize claims), and *Times Picayune Publ. Co.* v. *United States*, 345 U.S. 594, 615 (1953) (relevant market essential in § 1 "rule of reason" claims).

NFO's reliance on *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961), is equally misplaced. That case clearly conflicts with decisions in the Fourth, Fifth and Eleventh Circuits and conflicts in principle with Third and District of Columbia Circuit authorities. AMPI Petition at 14; Mid-Am Petition at 11-13. Respondent's reliance on *Hunt-Wesson* and *Consolidated Laundries* reinforces, rather than negates, the existence of a wide-spread circuit conflict. There is no precedent in this Court, and NFO cites none,[4] that rele-

[4] Contrary to NFO's suggestion, *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), did not hold relevant market proof unnecessary in § 2 conspiracy cases. Opposition Br. at 9 n.5. The analysis at issue simply dealt with the amount of interstate commerce necessary to sustain jurisdiction.

vant market proof is not essential to prove a § 2 conspiracy violation. Such "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).[5] Because of the conflict, and the necessity for a definitive declaration of Sherman Act policy by this Court, *certiorari* should be granted.

## II. NFO's Damage Claim For Lost Membership Dues Does Not Arise "By Reason Of" The Alleged Restraint In The Market For Sale Of Raw Milk

NFO's Opposition Brief elides the difference, recognized by the Eighth Circuit, between its *members'* competitive injury in the form of "price reduction" damages, and NFO's "loss of dues" damages resulting from its alleged failure to attract and retain members. 687 F.2d at 1208-09; A. 62a-63a.[6] Claiming that "NFO competes with Petitioners for members and customers," (Opposition Br. at 13) NFO argues that as a "competitor," its standing is clear. *Id.* The basic flaw in this contention is that NFO improperly shifts the entire focus of its proffered antitrust violations—competition in the sale of milk—to an entirely different framework—competitition for membership—in order to justify standing. This it cannot do. The competitive milieu cannot be one thing for determining whether a violation exists and yet another for determining whether a plaintiff has standing to recover certain damages. Second, and even more important, respondent ignores the

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[5] NFO masks the fact that the appellate court, as well as NFO, specifically focused only upon the impact to NFO. If "competition" had been a serious concern, there would have been an assessment of the number of competitors, and the extent of competition, within a relevant market. Indeed, NFO concedes that the level of petitioners' market shares, a threshold inquiry to assess market power and effect upon competition, was "unresolved." Opposition Br. at 11 n.6 (continued).

[6] The Eighth Circuit held that NFO lacks standing to sue for price reduction damages suffered by its members. 687 F.2d at 1208-09; A.62a.

independent ground for denying standing to recover lost membership dues as stated in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, ___ U.S. ___, 103 S. Ct. 897 (1983). There, this Court held that the Union lacked standing to recover lost dues as antitrust damages under § 4 of the Clayton Act:

> If the Union claims that dues payments were adversely affected because employees had less incentive to join the Union in light of expanding nonunion job opportunities, its damage is more remote than the harm allegedly suffered by unionized subcontractors. The same is true if the Union contends that revenues from dues payments declined because its members lost jobs or wages because their unionized employers lost business. That harm, moreover, is even more indirect than the already indirect injury to its members, yet a number of decisions have denied standing to employees with merely derivative injuries . . .

*Id.* at 910 n.46.

Here as in *Associated General Contractors*, "the tenuous and speculative character of the relationship between the alleged [reduced price received by NFO's members] and [NFO's] alleged [loss of dues] . . . and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of [NFO's] antitrust claim." *Id.* at 913.

NFO's damage claim for lost membership dues describes a claim based upon a restraint in the "market" for collective bargaining and political representation services rather than competitive injury from an unlawful restraint in the milk sales market. Such a claim is of no concern to the antitrust laws. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977). Here, as in *Associated General Contractors*, "the remote and obviously speculative character of that harm [alleged by NFO] is plainly sufficient to place it beyond the reach of § 4." 103 S. Ct. at 912 n.52.[7] Respondent's contentions

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[7] As explained in CMPC's Petition at 11, there is no direct relationship between dues paying membership in NFO and the marketing of milk through NFO's collective bargaining program.

do not detract from the importance of establishing the independent principle that lost membership dues are too speculative to confer antitrust standing upon membership organizations—union or otherwise.

### III. Exempt Joint Conduct Was The Linchpin Of The Eighth Circuit's Finding Of A Conspiracy

At the outset it should be noted that respondent concedes, albeit grudgingly, that "exempt joint conduct comprised only a tiny portion" of the Eighth Circuit's finding of a conspiracy. Opposition Br. at 19 n.13. Although NFO constantly refers to "pervasive evidence" of a conspiracy, it cites no evidence other than exempt joint conduct. The unalterable fact is that the Eighth Circuit relied upon a great deal more than just a "tiny portion" of exempt joint conduct to infer the existence of a conspiracy.

The only bases for the existence of a conspiracy articulated by the court of appeals were: (1) joint marketing activities exempt under the Capper-Volstead Act; and (2) joint attempts to influence state and federal governments, which were held exempt under the *Noerr-Pennington* doctrine. 687 F.2d at 1195; A. 34a-35a.[8]

In an effort to obscure the point, respondent refers to exhibits not even mentioned or considered by the court of appeals as evidence of a conspiracy. Opposition Br. at 18 n.12.[9] NFO

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[8] The so-called "boycotts, milk supply cut-offs, short-shipping, discriminatory pricing, bad faith litigation and threats of litigation" alluded to by respondent were not joint or concerted acts, as the Eighth Circuit itself recognized. 687 F.2d at 1194; A.32a.

[9] Although NFO refers to the October 19, 1970 meeting as evidence of joint conduct, it does not contest that this meeting constituted *exempt* joint conduct involving an exercise of First Amendment rights and exploring the possibility of petitioning states' attorneys general concerning NFO's cooperative qualification. *See* AMPI Petition at 19 n.18. The remaining exhibits cited by NFO do not even reflect joint conduct of any form.

then warns this Court that it must engage in a *de novo* review of the underlying record if it decides to re-examine the Eighth Circuit's decision. *Id.* No such review is required since the Eighth Circuit's clear reliance on exempt joint conduct as the predicate for conspiracy raises a straightforward legal issue of major importance.[10]

Contrary to respondent's assertion (Opposition Br. at 19 n.13), petitioners *do* urge that the Eighth Circuit's decision directly conflicts with this Court's decision in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 671 (1965). AMPI Petition at 20-21. We reiterate that the Eighth Circuit misinterpreted the crux of this Court's *Pennington* holding that an unlawful conspiracy finding cannot be predicated *solely or in part* upon exempt conduct. *Id.* The Eighth Circuit improperly relied upon exempt joint conduct to infer a conspiracy.

NFO's contention that litigation and threats of litigation were in themselves joint conduct, which is clearly unsupportable, belies its claim that exempt joint conduct was only a "tiny portion" of the conduct relied upon by the court of appeals. That may explain NFO's unwillingness to even respond to another important aspect of the Eighth Circuit's erroneous application of the *Noerr-Pennington* exemption. The Eighth Circuit's decision precludes application of the exemption based on an erroneous competitor-customer distinction relating to litigation and threats of litigation. The Constitutional policies incorporated in the *Noerr-Pennington* exemption and the sound application of these policies protect litigation and threats of litigation whether directed at a competitor or customers of a competitor. AMPI Petition at 23-24. This error raises an important legal issue which, unless corrected, will lead to an erosion of the *Noerr-Pennington* exemption.

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[10] Respondent's perception of this Court's standard of review is premised upon, and is testimony to, the rather sweeping *de novo* appellate fact-finding engaged in by the Eighth Circuit.

### IV. The Court Of Appeals Usurped The Fact-Finding Function Of The Trial Court

Respondent's retort to the Rule 52(a) argument is that the Eighth Circuit "went out of its way to give deference to the trial court's opaque 'opinion'." Opposition Br. at 21. If the trial court's fact-findings were "opaque," as NFO contends, then it is remarkable, to say the least, that NFO urged the appellate court to use those very findings as a basis for its *de novo* review. While arguing on appeal that the trial court's findings of fact were clear enough to establish its claimed antitrust violations, NFO simultaneously argued that the trial court itself failed to comply with Rule 52(a).

The Eighth Circuit's decision is clear appellate fact-finding in derogation of Rule 52(a). The court of appeals unabashedly drew numerous inferences of intent, weighed conflicting testimony and made credibility determinations to reach factual conclusions diametrically opposed to those found by the trial court. AMPI Petition at 24-29. To say that the appellate court accorded "remarkable" "deference" to the trial court, because the appellate court did not rewrite *all* of the trial court's findings of fact, is a rather facile attempt to obscure the basic issue. Opposition Br. at 20.

The Eighth Circuit usurped the trial court's function and, despite the disclaimers, conducted a *de novo* review fundamentally at odds with this Court's decisions in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S. Ct. 1781, 1790 (1982), *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 495-96 (1950), and *United States* v. *Yellow Cab*, 338 U.S. 338, 341 (1949).

### V. The Eighth Circuit Erroneously Refused To Apply This Court's Decision In *National Broiler Marketing Ass'n* To This Case.

The Eighth Circuit found that NFO had engaged in a *prima facie, per se* Sherman Act price fixing violation, but held that such conduct fell within the Capper-Volstead Act antitrust

exemption. 687 F.2d at 1184; A. 12a-13a. The court of appeals applied the exemption to NFO's conduct, despite the existence of NFO's non-farmer members, on the following grounds: (1) the court refused to *retroactively* apply the *National Broiler* rule that even one "non-farmer" member defeats the exemption, 687 F.2d at 1187; A. 17a-18a; (2) the court modified the *National Broiler* rule to permit non-farmer members provided they were not "middlemen." 687 F.2d at 1186; A. 16a-17a. Instead of addressing these issues, NFO simply reargues the evidence and lamely suggests that the appellate court never found that NFO had non-farmer members during the period in question. Contrary to NFO's contention, the appellate court agreed with the trial court's findings that NFO *did* have non-farmer members during this period. 510 F. Supp. at 426; A. 155a; 687 F.2d at 1185-87; A. 14a-18a.

This case squarely presents two straightforward legal issues: (1) whether the *National Broiler* rule means what it says—the existence of even one non-farmer member vitiates the Capper-Volstead Act exemption; and (2) whether the 1978 *National Broiler* decision has retroactive application.

Resolution of these issues is essential to clarify the scope and meaning of the Capper-Volstead exemption and guide the hundreds upon hundreds of agricultural cooperatives that must conform their operations to the proper legal standards.

### VI. The Eighth Circuit's Award Of Costs And Attorneys' Fees Conflicts With Holdings In Other Circuits

Respondent's assertion that the Eighth Circuit's award of certain "expenses" does not conflict with the decisions of other circuits is wrong. Opposition Br. at 23. Indeed, the Eighth Circuit explicitly recognized a circuit split on whether the language of Clayton Act § 4 encompasses an award of expenses beyond those normally considered as statutory costs. *See* P. App. B at 7a, *comparing State of Illinois* v. *Sangamo Construction Co.*, 657 F.2d 855, 866 (7th Cir. 1981) *with Copper Liquor, Inc.* v. *Adolph Coors Co.*, 684 F.2d 1087, 1100-1101 (5th Cir. 1982). The Eighth Circuit chose to align itself with the "liberal interpretation" of the Fifth Circuit, and clearly ac-

knowledged the existence of conflicting authority.[11] P. App. B at 7a. NFO never even alluded to the conflict among the circuits on this issue.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

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[11] Although the Eighth Circuit cited only *Sangamo Construction, supra*, several other courts have held certain expenses to be nontaxable costs of litigation. *See* CMPC Petition at 29 n.37.